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25 UNITED STATES DISTRICT COURT
26 NORTHERN DISTRICT OF CALIFORNIA

27 MARK OPPERMAN, et al.,

28 Plaintiffs,

v.

PATH, INC., et al.,

Defendants.

Case No: 13-cv-00453-JST

CLASS ACTION

**NOTICE OF MOTION AND MOTION
TO WITHDRAW PUTATIVE CLASS
REPRESENTATIVE THEDA
SANDIFORD AND DISMISS HER
CLAIMS WITHOUT PREJUDICE**

DATE: November 19, 2015
TIME: 2:00 PM
COURTROOM: 9, 19th Floor
JUDGE: Honorable Jon S. Tigar

1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on November 19, 2015, in Courtroom 9, 19th Floor of the
4 U.S. District Court for the Northern District of California, San Francisco Division, plaintiff Theda
5 Sandiford and Plaintiffs’ Interim Counsel will, and hereby do, move pursuant to Federal Rule of
6 Civil 41(a)(2) to dismiss plaintiff Theda Sandiford as a party to this litigation and to withdraw her
7 claims without prejudice.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. STATEMENT OF POSITION**

10 Due to exigent circumstances impinging upon plaintiff Theda Sandiford’s ability to serve
11 on behalf of absent class members as a class representative in this action, she now respectfully
12 asks that this Court exercise its discretion under Federal Rule of Civil Procedure 41(a)(2) to
13 dismiss her from this litigation and to withdraw her claims without prejudice or conditions.

14 **II. INTRODUCTION**

15 Sandiford no longer seeks to carry on her duties and obligations as a class representative
16 arising from her claims against Defendants Apple, Inc., Chillingo, Ltd., Foodspotting, Inc.,
17 Foursquare Labs, Inc., Electronic Arts, Inc. (“EA”), Gowalla, Inc., Instagram, LLC, Rovio
18 Entertainment, Ltd., Twitter, Inc., and ZeptoLab UK Ltd. (collectively, the “Charged
19 Defendants”). (*See* Declaration of Theda Sandiford (“Sandiford Decl.”), ¶¶ 1-4, filed concurrently
20 herewith; ECF #478, at ¶ 211, et seq.) This litigation will not be impacted and neither Defendants
21 nor the putative class or classes will experience legal prejudice as a result of Sandiford’s voluntary
22 dismissal of her claims.

23 Because the Charged Defendants refused to stipulate to Sandiford’s voluntary dismissal
24 without “conditions,” Sandiford now moves for an Order under Fed. R. Civ. P. 41(a)(2) dismissing
25 her and her claims. Because other named Plaintiffs are prosecuting these same claims and because
26 Sandiford may be an eligible class member on some or all of the claims against these Defendants,
27 Sandiford respectfully requests that the voluntary dismissal of her claims be without prejudice or
28 any terms or conditions.

1 **III. RELEVANT FACTS AND PROCEDURAL HISTORY**

2 This lawsuit was filed in March 2012 in Austin, Texas. (ECF #01.) Sandiford, who lived
3 in Austin at the time, joined the lawsuit in May 2012. (ECF # 03 at ¶ 18; Sandiford Decl. at ¶¶ 1
4 & 2.)

5 The court in Austin subsequently transferred the case to this District and four other
6 putative class action cases were administratively related to it (two of which were subsequently
7 voluntarily dismissed). In June 2014, the fourteen (14) plaintiffs in the remaining related actions,
8 including Sandiford, filed their Second Amended Consolidated Complaint against Apple and the
9 12 named App companies (“App Defendants,” along with Apple the “Defendants”). (ECF # 478,
10 the “SCAC” or “Complaint.”)

11 The SCAC alleges that each Defendant offered iOS mobile device software applications
12 (“Apps”) designed to and that did access and trigger the upload and transmission of private address
13 book data from consumers’ Apple-manufactured wireless mobile devices (“iDevices”). Each
14 named plaintiff stated a claim in the SCAC corresponding to the App Defendants whose App she
15 received from Apple, as well as an aiding-and-abetting claim against Apple in connection
16 therewith. (ECF # 478.) Plaintiffs also stated claims against Apple for misrepresenting and mis-
17 marketing, both directly and by omission, Apple’s iDevices, including in its statements to
18 consumers relating to the security and privacy features and protections they supposedly contained
19 and provided. (ECF # 478.)

20 In March 2015, the Court ruled that plaintiffs adequately pled claims for invasion of
21 privacy/intrusion upon seclusion against the App Defendants and against Apple for aiding and
22 abetting the same and for misrepresenting and mis-marketing its iDevices to consumers. (ECF
23 #543.) Defendants filed their respective Answers to the SCAC the following month. (ECF #547-
24 560.) Plaintiffs more recently issued common written discovery to Defendants, and Charged
25 Defendants Apple, EA, ZeptoLab, and Instagram each served written discovery requests
26 collectively on the named plaintiffs (*i.e.* — one set that applies to all named plaintiffs), deadlines
27 pending. (*See* Declaration of David M. Given (“Given Decl.”), ¶ 5, filed concurrently herewith.)
28

1 On September 24, 2015, plaintiffs' counsel informed defense counsel via email that
2 Sandiford desired and intended to withdraw from the litigation and to voluntarily dismiss her
3 claims in the SCAC against the Charged Defendants. (*See* Declaration of David M. Given ("Given
4 Decl."), ¶2, Ex. A at p. 3-4, filed concurrently herewith.) In anticipation of cooperation from
5 defense counsel, plaintiffs' counsel subsequently proffered a stipulation pursuant to Federal Rule
6 41(a)(1) for dismissing Sandiford from this action. (Given Decl., ¶ 3, Ex. B.)

7 On September 29, 2015, Apple's counsel responded on the Charged Defendants' behalf,
8 refusing to stipulate to a voluntary dismissal unless Sandiford responded to all outstanding written
9 discovery requests; counsel also conditioned any stipulation on a deposition of Sandiford, after
10 review of written discovery responses and at the option of each of the "defendant(s)." (Given
11 Decl., ¶ 4, Ex. A at p. 1-2.) Though Charged Defendants Apple, EA, ZeptoLab and Instagram
12 have served written discovery requests common to the named plaintiffs asserting claims against
13 them, no Defendant has propounded unique discovery upon Sandiford. (Given Decl., ¶ 5.) No
14 depositions have been taken or noticed of Sandiford or any other Plaintiff. (Given Decl., ¶ 5.) In
15 their Joint Case Management Conference Statement, the parties requested the Court set February
16 1, 2016 as the deadline for class certification motions. (ECF # 562, at 7.)

17 **IV. ARGUMENT**

18 **A. The Court Should Resolve All Rule 41 Determinations In Sandiford's Favor.**

19 Sandiford has stated a good and proper reason to withdraw from this case and voluntarily
20 dismiss her claims. No one will be prejudiced nor will the case be impacted in any material way
21 when that occurs.

22 Withdrawal is granted under Rule 41(a)(2) unless a defendant will experience "plain legal
23 prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001); *Stevedoring Servs. v.*
24 *Armilla Intern.*, 889 F.2d 919, 921 (9th Cir. 1989) (collecting cases). Withdrawal without
25 prejudice is the very "purpose of the rule." *Hamilton v. Firestone Tire & Rubber*, 679 F.2d 143,
26 145 (9th Cir. 1982).

27 Since the Charged Defendants have not stipulated to dismissal, under Rule 41 the Court
28 must determine: "(1) whether to allow dismissal; (2) whether the dismissal should be with or

1 without prejudice; and (3) what terms and conditions, if any, should be imposed.” *Arteris v.*
2 *Sonics*, No. C-12-0434-SBA, 2013 WL 3052903 (N.D. Cal. June 17, 2013); *Fraley v. Facebook*,
3 No. 11-cv-01726, 2012 WL 893152, at *2 (N.D. Cal. 2012); *Williams v. Peralta Cmty. Coll. Dist.*,
4 227 F.R.D. 538, 539 (N.D. Cal. 2005).

5 **B. The Court Should Grant Dismissal.**

6 Dismissal is granted where no “plain legal prejudice” results from the withdrawal. *Smith*,
7 *supra*, 263 F.3d at 975. Legal prejudice to a defendant is narrowly interpreted to mean “prejudice
8 to some legal interest, some legal claim, some legal argument.” *Westlands Water Dist. v. U.S.*,
9 100 F.3d 94, 97 (9th Cir. 1996). Courts consider the following “legal prejudice” factors: loss of
10 a federal forum, loss of the right to jury trial, loss of a statute-of-limitations defense, preclusion
11 of rights and defenses available to the defendants in future litigation, or bar against discovery
12 sufficient for defendants, for example, “to untangle complex fraud claims and adequately defend
13 themselves against charges of fraud.” *See id.* at 97-98. *See also Santa Rosa Mem’l Hosp. v.*
14 *Maxwell-Jolly*, No. 08-CV-5173 SC, 2015 WL 4451377 (N.D. Cal. July 20, 2015).

15 Sandiford’s role in this case is not unique and her withdrawal poses no prospect of
16 prejudice to any Charged Defendant’s legal interest, claim, or argument. Sandiford’s request to
17 withdraw comes at an early stage in the proceedings relative to the deadline for dispositive
18 motions or trial, neither of which the Court has set, and well before class certification motions are
19 expected in the case. *Roberts v. Electrolux Home Products, Inc.*, No. SACV 12-1644 CAS, 2013
20 WL 4239050 (C.D. Cal. Aug. 14, 2013) (listing “relevant” factors re “undue prejudice”).
21 Sandiford’s withdrawal from this action has no effect on the forum, the Charged Defendants’
22 procedural rights, or any statute of limitation defense.

23 As to discovery, Defendants Apple, EA, ZeptoLab UK, and Instagram propounded written
24 discovery seeking information relevant to Sandiford’s (and the other plaintiffs’) allegations in the
25 SCAC. But Sandiford’s allegations are not unique among the named plaintiffs as to any Charged
26 Defendant; as the SCAC reflects, all plaintiffs’ claims will remain alive as to all the Charged
27 Defendants. Because the remaining plaintiffs can provide all responsive, non-privileged
28

1 information to identical requests, Defendants will experience no “plain legal prejudice” from
2 Sandiford’s dismissal.

3 **C. The Court Should Grant Dismissal Without Prejudice to Sandiford’s Rights as**
4 **an Absent Class Member.**

5 This Court should grant dismissal without prejudice so that Sandiford can remain eligible
6 to be a class member.

7 Three factors determine whether the Court will dismiss a plaintiff’s claims with prejudice:
8 (1) the defendants’ “effort and expense” to date to try that plaintiff’s claims, (2) delay and “lack
9 of diligence” in the action, and (3) “insufficient explanation” by the plaintiff. *Sherman v. Yahoo*,
10 No. 13-CV-0041-GPC, 2015 WL 473270 at *8 (S.D.Cal. Feb. 5, 2015) (citing *Burnette v.*
11 *Godshall*, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993)).

12 Applying these factors, there is no basis for dismissing with prejudice. The Charged
13 Defendants do not appear to have expended any effort thus far specific to Sandiford; the remaining
14 named plaintiffs are prepared to continue litigating the same claims against each of the Charged
15 Defendants. *Fraleley, supra*, 2012 WL 893152 at *4. As a result, any effort expended thus far will
16 ostensibly apply to their defense of the case generally.

17 Nor is there excessive delay. *Sherman, supra*, 2015 WL 473270 at *3 (case “still at a
18 relatively early stage” one month prior to deadline for class certification motion); *Fraleley, supra*,
19 2012 WL 893152 at *3-4; *Roberts v. Electrolux Home Prods.*, No. 12-cv-01644, 2013 WL
20 4239050 at *2 (C.D. Cal. Aug. 14, 2013); *see also Westlands Water Dist., supra*, 100 F.3d at 97
21 (“[Plaintiffs] could have sought dismissal sooner than they did, but they were not dilatory.”).
22 Plaintiffs gave notice of Sandiford’s intended exit four months before the jointly-proposed date
23 for service of class certification motions, and before any trial setting. (ECF # 562.)

24 Finally, Sandiford has explained the basis for her withdrawal. (Sandiford Decl., ¶¶ 2 & 3.)

25 **D. The Court Should Grant Dismissal Without Terms or Conditions**

26 Rule 41(a)(2) authorizes the Court to dismiss without requiring more of the moving party,
27 or instead, to grant dismissal conditioned “on terms that the court considers proper.” Fed. R. Civ.
28 P. 41(a)(2).

1 While some courts have conditioned withdrawal upon the moving party first sitting for a
2 deposition, here Sandiford's status in the present putative class case does not justify her
3 deposition. *Dysthe v. Basic Research L.L.C.*, 273 F.R.D. 625, 629 (C.D. Cal. 2011). Unlike in
4 *Dysthe* and other similar cases (*Fraleley, supra*, 2012 WL 893152 at *4; *Sherman, supra*, 2015 WL
5 473270 at *7; cf. *Westlands Water Dist., supra*, 100 F.3d at 97 [no deposition ordered as condition
6 to dismissal]), Sandiford stated class claims against the Charged Defendants based on allegations
7 tracking the remaining plaintiffs' claims. Sandiford's claims vary from the other plaintiffs' only
8 by the Apps she downloaded, the iDevice she used, and the Apple marketing claims she recalls
9 (ECF # 543, at ¶¶ 211 *et seq.*) – none of which on their face are dispositive of the putative class
10 claims. Sandiford's motion is also not an attempt to avoid discovery obligations, as evidenced by
11 her declaration, and no deposition has even been noticed of her (the Charged Defendants first
12 mention of a deposition was in response to Sandiford's notice to them that she intended to exit the
13 case).

14 While in the rare case courts will award costs or fees as a condition of dismissal, those
15 awarded fees or costs are limited to work that would not apply to the ongoing claims against the
16 Defendants. *Westlands, supra*, 100 F.3d at 97; *Arteris, supra*, 2013 WL 3052903 at *4; *see also*
17 *Stevedoring Servs., supra*, 889 F.2d at 921-22. Here, the remaining named plaintiffs intend to
18 litigate identical claims against the Charged Defendants following Sandiford's withdrawal. (ECF
19 # 478). Consequently, no award is merited for costs or fees (the Charged Defendants have no fee
20 entitlement in any event) of any of the Charged Defendants.

21 **V. CONCLUSION**

22 For the foregoing reasons, the Court should dismiss Sandiford from the litigation without
23 prejudice and deny any Defendant's request for conditions on her dismissal.

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Dated: October 13, 2015

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